Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–186 OF 1996

ABDUL HAMID MOHAMAD FCJ, ARIFIN ZAKARIA AND MOHD GHAZALI JJCA

5 OCTOBER 2004

Constitutional Law — Fundamental liberties — Equal protection — Collective agreement similar to court order and not considered law in context of art 8 — Only binding on individual parties — Whether art 8 only protect and provide remedy to private individual and not public authority — Federal Constitution art 8

Labour Law — Employment — Termination of service — Terms and conditions of collective agreement — Right to terminate service if requirement to resign once pregnant not followed — Whether termination of service void — Whether contravene Federal Constitution and Employment Act 1955 — Federal Constitution art 8, Employment Act 1955 ss 37, 40

Labour Law — Employment — Damages — Loss of employment and benefits — Whether entitled to claim

The appellant was a flight stewardess with the first respondent, Sistem Penerbangan Malaysia. Her terms and conditions of service was governed by a collective agreement, whereby art 2(3) required the appellant to resign if she became pregnant. In event she failed to do so, the company shall have the right to terminate her services. The appellant became pregnant and refused to resign. Thus, the first respondent terminated her services. The appellant commenced proceedings in the High Court praying for a declaration that: (i) arts 2, 14 and 19 of the collective agreement contravened art 8 of the Federal Constitution and was therefore void and (ii) the appellant's termination of service was void as it contravened s 14(3) of the Industrial Relations Act 1967 and ss 37 and 40 of the Employment Act 1955. This was her appeal to the Court of Appeal against the High Court judge's decision in dismissing her application.

Held, dismissing the appeal with costs:

(1) A collective agreement, though taken cognizance of by the Industrial Court was only binding on the parties therein, though enforceable by the Industrial Court. The discrimination prohibited by art 8(2) of the Federal Constitution as at the date applicable to this case was on the ground only of religion, race, descent or place of birth, none of which applied to this case. In any event, it can be argued that art 2(3) of the First Schedule of the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men. Thus, this ground had no merits. A case has to be decided on its facts. The appellant did not introduce any evidence that the first appellant is 'a public authority' to bring it within the ambit of the constitutional

provision. A mere statement that the first appellant was a government agency was not sufficient (see paras 7–9, 14).

(2) It was argued that art 2(3) of the First Schedule to the collective agreement contravened the provisions of s 37 of the Employment Act 1955. There was no relevance of that provision to the facts of this case. Similarly, the provision of s 40 of the Employment Act 1955 had no relevance in the instant case as it only requires a female employee who is leaving her employment to give four months notice to her employer about her pregnancy failing which she would not be entitled to any maternity allowance. Thus, no 'purposive interpretation' could be given to the provision to render the provisions of the collective agreement null and void (see paras 16–17).

[**Bahasa Malaysia summary**

Perayu seorang pramugari dengan responden pertama, Sistem Penerbangan Malaysia. Terma dan syarat perkhidmatan beliau dikawal oleh satu perjanjian kolektif, di mana perkara 2(3) menghendaki beliau berhenti kerja jika beliau mengandung. Sekiranya gagal berbuat demikian, syarikat berhak untuk menamatkan perkhidmatannya. Perayu mengandung dan enggan berhenti kerja. Oleh itu, responden pertama telah menamatkan perkhidmatan beliau. Perayu telah memulakan prosiding di Mahkamah Tinggi memohon satu deklarasi bahawa: (i) perkara-perkara 2, 14 dan 19 perjanjian kolektif bertentangan dengan perkara 8 Perlembagaan Persekutuan dan oleh itu adalah tidak sah; dan (ii) penamatan perkhidmatan perayu adalah tidak sah kerana ia bertentangan dengan s 14(3) Akta Perhubungan Perusahaan 1967 dan ss 37 dan 40 Akta Pekerjaan 1955. Ini adalah rayuan beliau ke Mahkamah Rayuan terhadap keputusan hakim Mahkamah Tinggi yang menolak permohonan beliau.

Diputuskan, menolak rayuan dengan kos:

(1) Satu perjanjian kolektif, walaupun diketahui oleh Mahkamah Perusahaan hanya terikat ke atas pihak-pihak, meskipun boleh dikuatkuasakan oleh Mahkamah Perusahaan. Diskriminasi yang dihalang oleh perkara 8(2) Perlembagaan Persekutuan seperti pada masa kes ini dibuat adalah hanya atas alasan agama, bangsa, keturunan atau tempat kelahiran, yang mana tiada berkaitan dalam kes ini. Dalam apa keadaan, ia boleh dihujah bahawa perkara 2(3) kepada Jadual Pertama perjanjian kolektif adalah bersifat diskriminasi sama seperti ia tidak boleh dihujahkan secara munasabah bahawa peruntukan undang-undang yang memberikan cuti bersalin kepada wanita adalah bersifat diskriminasi terhadap lelaki. Oleh itu, alasan ini tiada merit. Suatu kes hendaklah diputuskan berdasarkan faktanya. Perayu tidak memperkenalkan apa-apa keterangan bahawa perayu pertama adalah 'a public authority' untuk merangkumkannya di bawah peruntukan perlembagaan. Kenyataan bahawa perayu pertama adalah satu agensi kerajaan tidak memadai (see paras 7–9, 14).

(2) Adalah dihujahkan bahawa perkara 2(3) kepada Jadual Pertama perjanjian kolektif bertentangan dengan peruntukan s 37 Akta Pekerjaan 1955. Tiada kaitan peruntukan tersebut dengan fakta kes ini. Tambahan pula, peruntukan s 40 Akta Pekerjaan 1955 tiada kaitan dalam kes semasa kerana ia hanya menghendaki pekerja wanita yang meninggalkan pekerjaannya untuk memberikan notis empat bulan kepada majikan tentang keadaan beliau yang mengandung di mana beliau tidak akan berhak kepada apa-apa elaun bersalin. Oleh itu, tiada 'purposive interpretation' akan diberikan kepada peruntukan tersebut untuk menyebabkan perjanjian kolektif tersebut terbatal dan tidak sah (lihat perenggan 16–17).]

Notes

For cases on damages under employment, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 829–835.

For cases on equal protection, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1760–1767.

For cases on termination of service, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1141–1179.

Cases referred to

Air India v Nergesh Meerza (1981) 68 AIR 1829 (refd)

Legislation referred to

Employment Act 1955 ss 37, 40
Federal Constitution art 8(2)
Industrial Relations Act 1967 s 14(3)
Interpretation Acts 1948 and 1967 s 17A
Labour Act 1955 s 7

Abdul Hamid Mohamad FCJ (delivering judgment of the court):

[1] The appellant started working as a flight stewardess, Salary Grade B, with the first respondent on 14 October 1980. The terms and conditions of the service was governed by the collective agreement dated 3 May 1988. Article 2(3) of the First Schedule to the collective agreement requires the appellant to resign on becoming pregnant. In the event she fails to resign, the company shall have the right to terminate her services. Upon the appellant becoming pregnant and refusing to resign, the first respondent terminated her services. The appellant commenced proceedings in the High Court praying for a declaration that:

(a) the collective agreement dated 1 September 1987 contravened art 8 of the Federal Constitution and is therefore void;

(b) articles 2, 14 and 19 of the collective agreement are void as they contravene art 8 of the Federal Constitution;

(c) The appellant's termination of service is void as it contravenes s 14(3) of the Industrial Relations Act 1967 and s 7 of the Labour Act 1955.

[2] She also prayed for damages for loss of employment and benefits derived therefrom, payment of salary and benefits from 1 April 1991, interests and costs.

[3] The learned High Court judge dismissed the application with costs. The appellant appealed to this court. We dismissed the appeal. These are our grounds.

[4] Learned counsel for the appellant argued that art 8 of the Federal Constitution does not say that only the State should not practise discrimination. So, the provision does not only apply to the State. Learned counsel further argued that in 1991, the first respondent was 'a government agency'.

[5] **I**t is elementary that constitutional law is a branch of public law. As Dr (Justice) Durga Das Basu in his book *Comparative Constitutional Law* puts it:

> Hence, the correct position is that in Constitutional law, as a branch of public law, *either or both* the parties must be the State, as distinguished from a private individual.
>
> From the Public Law stamp of Constitutional Law, the following consequences arise:
>
> I As a branch of public law, Constitutional law, deals with the contravention of individual rights by a public authority, ie the State itself or any of its agencies, as distinguished from another individual.
>
> II Where *both* the parties affected by the infringement of a right are private individuals, Constitutional Law would take no cognisance of it by extending its substantive or procedural provisions.
>
> Thus, even where the right violated by an individual is protected by the Constitution as a 'fundamental' right, nothing in arts 19 or 32 of the Indian Constitution can be invoked by the other individual who is aggrieved by such violation.
>
> The very concept of a 'fundamental right' involves State action. It is a right guaranteed by the State for the protection of an individual against arbitrary invasion of such right by the State. Where the invasion is by another private individual, the aggrieved individual may have his remedies under private law, but the constitutional remedy would not be available.

[6] To give an example, a father may not allow his daughter to marry a person of a different race but allows his son to do the same. The daughter has no constitutional remedy.

[7] In any event, we fail to see how, on the facts, the case is caught by art 8 of the Federal Constitution. Clause (1) declares that all persons are equal before the law and entitled to equal protection of the law. A collective agreement is not 'law' in the context of art 8. It is a contract when taken cognizance of by the Industrial Court, is enforceable as an award of that court. In other words, it is similar to a court order. Even a court order is not

'law' in the context of art 8. It is only an order binding on the parties therein. Similarly, a collective agreement, though taken cognizance of by the Industrial Court is only binding on the parties therein, though enforceable by the Industrial Court.

[8] The discrimination prohibited by art 8(2) of the Federal Constitution as at the date applicable to this case is on the ground only of religion, race, descent or place or birth, none of which applies to this case. The amendment to the Constitution which added the word 'gender' to that provision only took effect from 28 September 2001. In any event, we do not think that it can be argued that art 2(3) of the First Schedule of the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men.

[9] In our judgment, this ground has no merits.

[10] Learned counsel for the appellant, in a cursory manner, stated from the bar that the first respondent was, at that time, 'a government agency'. He did not refer to any evidence to support it.

[11] On the other hand, we note that the appellant herself in her affidavit in support of her originating summons clearly stated:

> 2) Pihak Penentang Pertama adalah sebuah syarikat yang ditubuhkan di Malaysia dan pejabat berdaftar mereka beralamat di … .

[12] We could not find any evidence whatsoever, neither was it pointed out to us, that the first appellant was 'a government agency' as casually mentioned by the learned counsel for the appellant. If the appellant wants the court to decide on that issue, the appellant should have introduced evidence in her affidavits to that effect. The appellant had not done so.

[13] The case of *Air India v Nergesh Meerza* (1981) 68 AIR 1829 (SC) was brought to our attention. We do not think we have to dwell at length on that case. After all it is a decision of a court in a different jurisdiction based on the law in that country, the peculiar position of Air India vis-a-vis the State and the facts of that case. We are always of the view that it is very dangerous merely to lift one or two passages from a judgment in a foreign jurisdiction and apply it as if it is our written law.

[14] In any event, a case has to be decided on its facts. As has been pointed out, the appellant herself did not introduce any evidence, not even a statement, that the first appellant is 'a public authority' to bring it within the ambit of the constitutional provision. A mere statement from the bar that the first appellant was a government agency is not sufficient.

[15] Next, it was argued that art (3) of the First Schedule to the collective agreement contravenes the provisions of s 37 of the Employment Act 1955. That section is too long to reproduce. Suffice for us to say that that section talks about entitlement to maternity leave, the length of the period of maternity leave a female employee is entitled to and the entitlement to maternity allowance. We just do not see the relevance of that provision to the facts of this case.

[16] Our attention was also drawn to the provision of s 40 of the Employment Act 1955 and we were urged to give a purposive interpretation as provided by s 17A of the Interpretation Acts 1948 and 1967. With respect, we are unable to see the relevance of s 40 of the Employment Act 1955. That section only requires a female employee who is leaving her employment to give four months notice to her employer about her pregnancy failing which she would not be entitled to any maternity allowance. We fail to see what kind of 'purposive interpretation' could be given to the provision to render the provisions of the collective agreement null and void. This ground too has no merits.

[17] On these grounds, we dismissed the appeal with costs. The deposit was ordered towards taxed costs.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari